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SUPREME COURT, U. S.

Vol. II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948

No. 390

HENRY M. PROPPER, AS RECEIVER OF THE PROPERTY AND ASSETS WITHIN THE STATE OF NEW YORK OF A. K. M., PETITIONER,

vs.

TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 30, 1948.

CERTIORARI GRANTED JANUARY 3, 1949.

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United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

1

TOM C. CLARK, Attorney General, as successor to the Alien Property Custodian,

Plaintiff-Appellee,

—against—

DEEMS TAYLOR, as President of the American Society of Composers, Authors and Publishers, an unincorporated association of more than seven members,

Defendant-Appellee,

2

and

HENRY M. PROPPER, as Receiver of the property and assets within the State of New York of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, commonly known as A.K.M.,

Defendant-Appellant.

Statement Under Rule 15, Subdivision (b)

3

This action was commenced on the 22nd day of April, 1946. The names of the original parties are James E. Markham, Alien Property Custodian, plaintiff, and Deems Taylor, as President of the American Society of Composers, Authors and Publishers, an unincorporated association of more than seven members, and Henry M. Propper, as Receiver of the property and assets within the State of New York of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, commonly known as A.K.M., defendants.

Statement Under Rule 15, Subdivision (b)

There has been no change of parties to the action except that Tom C. Clark, Attorney General, as successor to the Alien Property Custodian, was substituted as plaintiff in place and stead of James E. Markham, Alien Property Custodian, the original plaintiff.

The complaint in the action was filed on the 22nd day of April, 1946. The answer of defendant Henry M. Propper, as Receiver, etc., was filed on the 13th day of May, 1946. The answer of the defendant Deems Taylor, as President, etc., was filed on the 7th day of October, 1946.

No defendant was arrested, or bail taken; no property was attached or arrested on account of the proceedings hereunder.

No trial was had herein.

The final decree appealed from was entered upon a stipulation between plaintiff-appellee and defendant-appellee over the opposition of defendant-appellant.

Previous to said final decree appealed from, a judgment was entered as the result of a decision by Cox, U.S.D.J., rendered the 21st day of January, 1947, upon (1) a motion by the defendant Henry M. Propper, as Receiver, as aforesaid, for judgment on the pleadings under Subdivision "c" of Rule 12 of the Rules of Civil Procedure, or for summary judgment under Rule 56 of the Rules of Civil Procedure, dismissing Count 2 of the complaint herein; and (2), a cross motion by the plaintiff for judgment on the pleadings, or for summary judgment in favor of the plaintiff and against said defendant receiver on Count 2 of the complaint. An appeal to this Court from said judgment resulted in a decision of this court dismissing said appeal on the specific ground that said judgment was not final and was not therefore appealable. Accordingly, said judgment is now also

Statement Under Rule 15, Subdivision (b)

brought for review on the appeal from said final decree. The record in said previous appeal is stipulated as forming part of this record. 7

No question was referred to a master or referee; and no result of such proceedings and no report on any such reference exist.

The final decree appealed from is dated the 21st day of November, 1947, and was entered on the same day. This appeal was taken on the 5th day of December, 1947.

The previous judgment brought up for review herein is dated the 10th day of February, 1947, and was entered on the 11th day of February, 1947, on the basis of a decision by Coxe, *U.S.D.J.*, dated January 21, 1947. The previous appeal from said judgment was taken on February 28, 1947. 8

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Stipulation Dated November 13, 1947

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civ. 35-581

TOM C. CLARK, Attorney General, as successor to the Alien Property Custodian,

Plaintiff,

—v.—

DEEMS TAYLOR, as President of the American Society of Composers, Authors and Publishers, an unincorporated association of more than seven members,

and

HENRY M. PROPPER, as Receiver of the property and assets within the State of New York of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, commonly known as A.K.M.,

Defendants.

It is stipulated and agreed by and between the plaintiff, Tom C. Clark, Attorney General, as successor to the Alien Property Custodian, and the defendant, Deems Taylor, as President of the American Society of Composers, Authors and Publishers (hereinafter called ASCAP), as follows:

1. This stipulation supersedes Count II of the stipulation between the parties dated May 15, 1947.

2. The royalties allocable by ASCAP to Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger (A.K.M.) for the period prior to December 31, 1938, pursuant to the terms of the written agreement between ASCAP and A.K.M. dated January 1, 1933, and which are claimed by plaintiff under Vesting Order 2097 or otherwise under Count II of his complaint herein, are in the total net sum of forty-six thousand eight hundred thirty-nine dollars and fifty-four cents ($46,839.54), after payment of all Federal, state and local taxes. Defendant represents that these taxes have been paid and assumes responsibility for their payment.

3. The defendant consents to the immediate entry of a final decree herein, in the form hereto annexed, under Section 17 of the Trading with the Enemy Act, as amended, directing the defendant to pay and deliver to the plaintiff the said sum of $46,839.54.

4. All of the foregoing shall be without prejudice to the rights of ASCAP, if any, to file any claim or to proceed against the United States, the plaintiff, his successors in office, or the Treasurer of the United States under the procedure provided by the Trading with the Enemy Act, as amended, or otherwise, to establish and secure payment of any debts, claims, or demands owing to ASCAP by A.K.M. or its members from any money or property held by the United States or by the plaintiff or his successors in office, or by the Treasurer of the United States under the Trading with the Enemy Act, as amended.

5. If an appeal be taken by any party to this action from the final decree entered pursuant to this stipulation, and

if, as a final result of said appeal, such decree (or the interlocutory decree herein of February 10, 1947) be reversed, the final decree so entered pursuant to this stipulation shall be vacated.

6. Execution shall be stayed until 30 days after the time to appeal from the final decree to be entered pursuant to this stipulation has expired, and, if such appeal is taken, until 30 days after the final termination of said appeal and issuance of mandate thereon to the District Court.

Dated: New York, November 13, 1947.

TOM C. CLARK, *Attorney General*, as successor to the Alien Property Custodian.

By JAMES D. HILL

JAMES D. HILL,
Attorney for Plaintiff.

DEEMS TAYLOR, as President of the American Society of Composers, Authors and Publishers.

By (s) SCHWARTZ & FROHLICH

SCHWARTZ & FROHLICH,
Attorneys for Defendant.

Objections

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil 35-581

[SAME TITLE]

Now comes the defendant Henry M. Propper as Receiver as aforesaid and as and for his objections to the entry of final decree pursuant to stipulation between the plaintiff as successor as aforesaid and the defendant Deems Taylor as president as aforesaid, dated the 13th day of November, 1947, upon a hearing at pretrial conference pursuant to notice of motion for such pretrial conference dated the 6th day of November, 1947, and alleges:

1. That under the mandate of the Circuit Court of Appeals and the pleadings herein, there are serious questions of both fact and law requiring regular and legal trial of the action, and the Court is without jurisdiction, power or authority to enter a final decree pursuant to said stipulation upon a pretrial conference.

2. That all right, title and interest, both legal and equitable, in and to the subject of the second count of the action vested in the defendant Propper as Receiver by the order of his appointment dated June 12, 1941, and subsequently confirmed by the final judgment in the State Court action dated September 29, 1941, both entered under and by virtue of Section 977-B of the New York Civil Practice Act.

Objections

22 3. That the subject of Count 2 of the action and said cause of action herein have been, since June 12, 1941, and still are, in the exclusive custody, possession and jurisdiction of the Supreme Court of the State of New York, subject to its exclusive orderly administration through receivership proceedings pending therein. The proposed final decree pursuant to said stipulation is an interference with such custody, possession and jurisdiction of said State Supreme Court.

4. That this Court is without jurisdiction, power or au-
23 thority to proceed in this action until a final determination is made by the courts of the State of New York of the actions now pending therein between the defendant Henry M. Propper, as Receiver as aforesaid, as plaintiff, and the defendant Deems Taylor, as President, as aforesaid, construing the New York State statute (Section 977-B of the New York Civil Practice Act) in relation to the rights and title of the defendant Propper as Receiver under said statute.

5. The final decree proposed to be entered pursuant to said stipulation necessarily involves a review of the order
24 of the New York Supreme Court appointing Henry M. Propper Receiver and expressly vesting in him as such Receiver all right, title and interest in and to the subject of Count 2 of this action and the said cause of action herein which review is limited to the Appellate Courts of the State of New York and is beyond the jurisdiction, power and authority of this Court.

6. The final decree proposed to be entered pursuant to said stipulation necessarily involves

Objections

(a) A denial of full faith and credit of the statutes and judicial proceedings of the State of New York in violation of the Constitution of the United States, and 25

(b) A deprivation of vested rights in property without compensation and without due process of law likewise in violation of the Constitution of the United States.

7. The final decree proposed to be entered pursuant to said stipulation is in violation of the rights of creditors who filed claims against the defendant Propper as Receiver and of the lien of the attorneys in the state receivership action, none of whom are parties to this action. 26

8. The stipulation which is the basis of the proposed final decree was entered into between the defendant Deems Taylor, as President, as aforesaid, as the debtor, and the plaintiff as successor of the Alien Property Custodian whose rights, if any, are possessory only and who had no power to settle or compromise on the terms proposed in the stipulations so as to affect the rights of the defendant Propper as Receiver and those of the creditors who filed claims or the lien of the attorneys in the State Court actions. 27

9. That the stipulation which is the basis of the final decree proposed to be entered herein purports to be a settlement for a substantially smaller sum of an admittedly large claim between the defendant Deems Taylor as aforesaid and the plaintiff as successor of the Alien Property Custodian. The latter is a public official who is acting without authority or power in that the said stipulation pur-

28 ports to settle the subject of Count 2 of the action and the sole cause of action herein for $46,839.54 which operates as a gratuity to the defendant ASCAP in that

(a) The amount due from the defendant ASCAP under the agreement in question only up to the end of 1938, as established by the admissions and documentary proofs elicited from said defendant in the State Court action, is the sum of $73,382.92 with interest from the 12th day of June, 1941. A statement of said indebtedness, with references to said proofs, is hereto annexed and made a part hereof (Exhibit A).

29

(b) Defendant Deems Taylor, as President, as aforesaid, is likewise indebted for the amounts due upon an accounting amounting, upon information and belief, to upwards of $200,000, for which a separate action is pending in the Supreme Court of the State of New York between defendant Propper as Receiver and the defendant Deems Taylor as aforesaid. A copy of the complaint in said action is hereto annexed and made part hereof (Exhibit B).

(c) In addition, the defendant ASCAP is in possession of the catalogue of A.K.M., the subject of said

30 complaint (Exhibit B), of the value of upwards of $250,000.

WHEREFORE, the defendant Henry M. Propper, as Receiver, as aforesaid, prays that the entry of a final decree pursuant to said stipulation be denied and that the judgment heretofore entered on the motion for summary judgment herein be vacated, and that all proceedings in the action be stayed pending final determination by the New

York State Courts of the actions therein pending, and for such other and further relief as to the Court may seem just and proper. 31

Dated, New York, November 20, 1947.

A. Walter Socolow
Attorney for Defendant Henry M. Propper, as Receiver of the property, etc. of A.K.M.
Office and Post Office Address:
No. 580 Fifth Avenue
Borough of Manhattan 32
New York 19, N. Y.

To:

Hon. John F. X. McGohey
United States Attorney
Attorney for Plaintiff
U. S. Court House
Foley Square
New York, N. Y.

Schwartz & Frohlich, Esquires
Attorneys for Defendant Deems Taylor, As President, etc. 33
1450 Broadway
New York, N. Y.

EXHIBIT A

THE AMOUNTS ADMITTEDLY UNPAID AND UNACCOUNTED FOR BY ASCAP TO AKM FOR THE YEARS 1936-1938

34

The admissions in the examination and the exhibits therein establish conclusively that there became due from ASCAP to AKM under the agreement, during the years 1936-1938, the following sums (References are to ASCAP'S examination before trial and exhibits therein in the state court action):

A. Amount Due Under the Agreement:

35

As of September 30, 1937 a balance due ASCAP to AKM for the year 1936 after deducting the amount admittedly accounted for by AKM to ASCAP for the same year, as shown in ASCAP's repartition statement for 1936 (pp. 15-16; Ex. 2, 1936 statement dated April 4th, 1938)	$11,376.78
36 As of September 30, 1938, the net total after claimed tax deductions which ASCAP admits to be due to AKM for the year 1937 as shown from ASCAP's repartition statements for that year (p. 17, Ex. 2 [a])	29,345.62

Exhibit A

As of September 30, 1939, the net total after claimed tax deductions which ASCAP admits to be due to AKM for the year 1938 as shown from the yellow work sheets prepared by ASCAP (p. 18, Ex. 3)	12,448.92		37
Total admittedly due under the agreement of at least		$53,171.32	
B. Tax Adjustments:			38
As of September 30, 1939 the amount of withholding tax for the year 1938 as shown from the yellow work sheets prepared by ASCAP which admittedly has not been paid (p. 20, Ex. 3)	$ 4,722.01		
As of December 31, 1936, the amount of tax adjustments for the years 1933, 1934 and 1935 as shown from schedules attached in the examination before trial (pp. 16, 38, Ex. A.)	4,916.52	9,638.53	39
Grand Total Due AKM from ASCAP		$62,809.85	

The interest on this indebtedness to the date of Mr. Propper's appointment as Temporary Receiver on June 12, 1941, amounts to $10,975.07, as follows:

Exhibit A

40

INTEREST ON TAX ADJUSTMENTS:

1933,	$ 984.23 @ 6%, 9/30/34 to 6/12/41,	$ 401.17
1934,	1,564.99 @ 6%, 9/30/35 to 6/12/41,	543.84
1935,	2,367.30 @ 6%, 9/30/36 to 6/12/41,	680.60

INTEREST ON ROYALTIES DUE AS PER ASCAP STATEMENTS:

1936,	$11,376.78 @ 6%, 9/30/37 to 6/12/41,	$ 2,588.19
1937,	29,345.62 @ 6%, 9/30/38 to 6/12/41,	4,915.39
41 1938,	12,448.92 @ 6%, 9/30/39 to 6/12/41,	1,338.26
	* 4,722.01 @ 6%, 9/30/39 to 6/12/41,	507.62
	$62,809.85	$10,975.07

* Unpaid withholding tax deducted for 1938.

42

EXHIBIT B

SUPREME COURT

COUNTY OF NEW YORK

43

HENRY M. PROPPER, as Receiver of the property and assets within the State of New York of STAATLICH GENEHMIGTE GESELLSCHAFT DER AUTOREN, KOMPONISTEN UND MUSIKVERLEGER, commonly known as A.K.M.,

Plaintiff,

—against—

DEEMS TAYLOR, as President of the American Society of Composers, Authors and Publishers, an unincorporated association of more than seven members, commonly known as ASCAP, 44

Defendant.

COMPLAINT

The plaintiff, by his attorney, A. Walter Socolow, complaining of the defendant, alleges as follows:

FIRST: Upon information and belief, that at all times hereinafter mentioned and up to some time in 1938 Staatlich Genehmigte Gesellschaft der Autoren Komponisten und Musikverleger (commonly known and hereinafter referred to as A.K.M.) was a foreign corporation organized and existing under and by virtue of the laws of the former Republic of Austria. 45

SECOND: Upon information and belief, that at all the times hereinafter mentioned American Society of Com-

46 posers, Authors and Publishers (commonly known as hereinafter referred to as ASCAP) was and still is an unincorporated association consisting of more than seven (7) persons and had and still has its principal place of business in the City, County and State of New York.

THIRD: Upon information and belief, that at the commencement of this action the defendant Deems Taylor was and still is the president of said ASCAP.

FOURTH: Upon information and belief, that on or about the 1st day of January, 1933, said A.K.M. and the said
47 ASCAP entered into an agreement in writing, wherein and whereby, subject to certain restrictions, during the period of said agreement, or extensions thereof, the said A.K.M. granted to the said ASCAP the sole and exclusive right to license in the United States, Alaska, Puerto Rico, the Philippine Islands, the Virgin Islands, Hawaii, and its colonies and possessions, the nondramatic public performance for profit, as therein defined, of certain copyrighted musical works, the performing rights of which then were or during the term of said agreement might be vested in or controlled by said A.K.M., and the said ASCAP agreed to require of
48 and collect from its licensees for the public performance of said musical works payment therefor upon the basis and in the manner specified in said agreement and to account to the said A.K.M. for each year on or before each 30th day of September succeeding the close of each calendar year during the term of said agreement and to pay over to said A.K.M. such moneys in respect to the public performance of such musical works as may be found to be due A.K.M. in accordance with said agreement; a copy of which agreement, exclusive of the list of said musical works referred

to therein as attached thereto, is hereto annexed and made part hereof, marked "Exhibit A". 49

FIFTH: Upon information and belief, that the said agreement by extensions or renewals thereof continued in force until the end of the calendar year of 1938, at which time the said agreement terminated and came to an end.

SIXTH: That during the period of said agreement, and as an incident thereof, the defendant ASCAP acquired possession and control of a certain listing or catalogue of musical compositions and other property and assets belonging to said A.K.M., all of which came into the possession of the defendant ASCAP, and were entrusted into its care and custody during the continuance of said agreement solely for the purposes of and particularly for the due performance of said agreement. 50

SEVENTH: That upon the termination of said agreement in or about the end of the calendar year 1938, as aforesaid, the defendant ASCAP ceased to have any right, title or interest in or to the said listing or catalogue, or in or to any of the musical compositions or in or to any other property of said A.K.M., or in or to the public performance or other use thereof, and the said ASCAP did not at any time after such termination have any such right, title or interest. 51

EIGHTH: Upon information and belief, that subsequent to such termination of said agreement, the said ASCAP continued and still continues to license and authorize others to license the performance of said musical works in the territories aforesaid and continued and still continues

52 to be credited with and to receive and collect therefrom large and substantial sums of money as license fees, income and otherwise.

NINTH: That the defendant ASCAP had never accounted for any of the property and moneys so collected and received by it from such continued licensing and authorization to license as aforesaid.

TENTH: That said continued licensing and authorization to license, and said continued collection and receipt of moneys and income, after the termination of said agreement, by the defendant ASCAP as aforesaid, were without permission or authority and in violation of the provisions for such termination of said agreement and of the fiduciary relation created thereby, and constituted a breach of trust by the defendant ASCAP.

53

ELEVENTH: That on the 12th day of June, 1941, by an order duly made by the Supreme Court of the State of New York and duly filed and entered in the office of the Clerk of the County of New York on the 13th day of June, 1941; the plaintiff was duly appointed Temporary Receiver of the property and assets of said A.K.M. within the State of New York, in an action brought by one Franz Sobotka against said A.K.M., upon a complaint alleging that said A.K.M. was liquidated and ceased to do business and demanding judgment for the appointment of a receiver to liquidate the property and assets of said A.K.M. within the State of New York, pursuant to Section 977-h of the Civil Practice Act.

54

Exhibit B

TWELFTH: That thereafter and prior to the commencement of this action, the plaintiff duly gave and filed his bond as such Temporary Receiver duly approved by a Justice of the Court as required by said order and said bond with such approval thereon was, prior to the commencement of this action and still is, on file in said Supreme Court, and said plaintiff has duly qualified and is now acting as such Receiver. 55

THIRTEENTH: That thereafter, and on or about the 29th day of September, 1944, by a final judgment entered in said action making permanent plaintiff's appointment as Receiver, pursuant to said statute, the plaintiff duly qualified and has ever since been and still is acting as such receiver. 56

FOURTEENTH: That by virtue of said statute of the State of New York under which the plaintiff was appointed Temporary Receiver and continued as Permanent Receiver; as aforesaid, title to all assets, credits, choses in action and property, tangible and intangible, of any and every kind whatsoever, which said A.K.M. then owned, was entitled to or might be entitled to claim or receive within the State of New York, vested in the plaintiff as such Temporary Receiver immediately upon the making of the order appointing him as such Temporary Receiver. 57

FIFTEENTH: That by the express provisions in the order appointing plaintiff Temporary Receiver, and by the express provisions of said statute under which said order was made, the plaintiff as such Temporary Receiver acquired all the powers and duties, in addition to those therein provided for, as are possessed by and confined upon receivers and trustees by the laws of the State of New York.

Exhibit B

58 SIXTEENTH: That by the express provisions of the statute under which the plaintiff was appointed receiver as aforesaid, the plaintiff as such receiver was and is deemed to be in possession of all property and assets, tangible and intangible, of the said A.K.M., in possession and control of the defendant ASCAP from the date of the service upon defendant ASCAP of a demand therefor, together with a copy of the order appointing plaintiff receiver.

SEVENTEENTH: That on or about the 9th day of July, 1941, and prior to the commencement of this action, there was duly served upon the said ASCAP a certified copy of said 59 order appointing plaintiff Temporary Receiver as aforesaid and a certificate of the Clerk of the County of New York certifying the qualification of the plaintiff as Temporary Receiver, together with a written demand, a copy of which is hereto annexed and made part thereof, marked "Exhibit B", requiring said ASCAP to, among other things

(a) Forthwith turn over and deliver to the plaintiff as such Temporary Receiver any and all property belonging to A.K.M. in its possession, including the listings and catalogue of musical works and compositions, and the performing rights thereto, in the United States 60 of America and its territories and possessions, and any and all other property of said A.K.M., and

(b) Forthwith to render to the plaintiff as such Temporary Receiver a just and true accounting with respect thereto, and forthwith to pay to the plaintiff as such Temporary Receiver any and all moneys found due from the defendant ASCAP to said A.K.M.

EIGHTEENTH: That the defendant ASCAP failed, neglected and refused to turn over and deliver to the plaintiff as receiver or otherwise the said listings and catalogue, or any of the other property and assets of said A.K.M. so coming into its possession and entrusted to its care and custody as aforesaid, and failed, neglected and refused to render to the plaintiff as receiver or otherwise any accounting whatsoever with respect thereto, or with respect to the moneys and income as received by the defendant ASCAP after the termination of said agreement as aforesaid.

NINETEENTH: That defendant ASCAP wrongfully and unlawfully misappropriated said listings and catalogue and the other property and assets of said A.K.M. coming to its possession, and entrusted to its care and custody, including said moneys and income, to its own exclusive use and benefit, and wrongfully and unlawfully, without permission or consent of the plaintiff, continued ever since and still continues to exploit said listing and catalogue and other property of said A.K.M. by continuing to license and authorize others to license the performance of said musical works in the territories aforesaid and to collect and receive large and substantial income therefrom and to appropriate such income to its own exclusive use, without accounting therefor or for any part thereof.

TWENTIETH: That the aforesaid acts and conduct of said defendant ASCAP were and are wrongful and unlawful and willful interference by defendant ASCAP with the rights and title of the plaintiff in the property and assets of said A.K.M. so vested in him by said statute of the State of New York as aforesaid, and were and are wrongful, will-

64 ful and unlawful interferences with plaintiff's possession of said property and assets also so vested in the plaintiff as receiver as aforesaid, and with the powers and duties conferred upon plaintiff as receiver as aforesaid.

WHEREFORE, plaintiff demands judgment against the defendant

1. Adjudging and decreeing that upon the termination of said agreement in or about the end of the calendar year 1938 the defendant ASCAP ceased to have any right, title or interest in or to the said listing or catalogue or in or to
65 any of the musical compositions or to any other property of said A.K.M. or in or to the public performance, and that the said ASCAP did not at any time after such termination have any such right, title or interest.

2. Adjudging, decreeing and directing that the defendant account to the plaintiff as receiver as aforesaid for any and all transactions, dealings and matters and things with respect to said listing and catalogue and the performing rights therein, and all other property of said A.K.M. so coming into its possession and entrusted to its care
66 and custody as aforesaid.

3. Adjudging, decreeing and directing that the defendant account to the plaintiff as receiver as aforesaid for any and all moneys or other property collected and received by it as a result of any and all licenses and authorization to license, the performance of said musical compositions or otherwise at any time since December 31, 1938.

4. Adjudging, decreeing and directing that the defendant pay to the plaintiff as receiver as aforesaid any and all

moneys which may be found due from it to the plaintiff upon such accounting.

5. Adjudging, decreeing and directing that the plaintiff forthwith turn over and deliver to the plaintiff as receiver as aforesaid all listings and catalogues with respect to property and assets of said A.K.M. which at any time came into its possession or were entrusted to its care and custody.

6. Enjoining and restraining the defendant from further entering into any and all contracts of licensing or from in any way or manner making any further use directly or indirectly of said listings or catalogues or any other property of said A.K.M., or otherwise dealing or interfering therewith, and collecting or receiving any further money or other property by reason thereof.

7. That the plaintiff have such other, further and different relief in the premises as to the Court may seem just and equitable, together with the costs and disbursements of this action.

A. Walter Socolow
Attorney for Plaintiff
Office and Post Office Address
No. 580 Fifth Avenue
Borough of Manhattan
New York 19, N. Y.

(Verified October 9, 1947)

Exhibit B

70 *Exhibit A* attached to the foregoing complaint consists of agreement, copy of which is attached to and made part of Count 2 of plaintiff's complaint in this action.

Exhibit B attached to the foreging complaint is demand by defendant Propper, as Receiver, on ASCAP, a copy of which is annexed to the answer of defendant Propper in this action.

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72

Final Decree

DISTRICT COURT OF THE UNITED STATES 73

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

The above matter having come on for hearing at pretrial conference on this 14th day of November, 1947, and the plaintiff Tom C. Clark, Attorney General, as successor to the Alien Property Custodian, and the defendant, Deems Taylor, as President of the American Society of Composers, Authors and Publishers, etc., having presented to the court 74
a stipulation entered into by said parties on May 15, 1947, by the terms of which the said parties have agreed and stipulated for settlement of plaintiff's claims under counts I and III of the complaint herein, and said settlements having been effected and said counts dismissed, and the said parties having presented to the court a further stipulation entered into between them on November 13, 1947, in which the said parties have agreed that the royalties allocated by the defendant in respect of the works of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger (A.K.M.) and demand by the plaintiff in count II 75
of the complaint herein are in the amount of $46,839.54, the said parties having further agreed in said stipulation for immediate entry of final decree under Section 17 of the Trading with the Enemy Act, as amended, directing the defendant to pay over and deliver to the plaintiff the moneys so allocated by the defendant in respect of the works of A.K.M., saving to the defendant, however, all of its rights, if any, under the Trading with the Enemy Act,

as amended, for return of said moneys or any part thereof, and said stipulations having been filed herein, and the court having examined the pleadings and papers on file, including the objections filed by the defendant Propper as receiver, dated Nov. 20, 1947, and having heard the statements of counsel and being fully advised and satisfied in the premises, it is therefore

ORDERED, ADJUDGED and DECREED that the defendant Deems Taylor, as President of the American Society of Composers, Authors and Publishers, etc., pay over and deliver to the plaintiff Tom C. Clark, Attorney General, as successor to the Alien Property Custodian, the sum of $46,839.54, without interest and without costs.

Dated: New York, New York,
November 21, 1947.

ALFRED C. COXE,
U. S. D. J.

Notice of Appeal

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

SIRS:

NOTICE IS HEREBY GIVEN that Henry M. Propper, as Receiver of the property and assets within the State of New York of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, commonly known as A.K.M., one of the defendants above named, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the final decree entered in this action on the 21st day of November, 1947; and that said defendant, as such Receiver aforesaid, also hereby appeals to the said United States Circuit Court of Appeals for the Second Circuit from, and will bring up for review upon the appeal from said final decree, the judgment entered in this action on the 10th day of February, 1947; and that the said defendant as such Receiver aforesaid hereby appeals from each and every part as well as from the whole of said final decree and judgment and each of them.

Dated: New York, December 5, 1947.

82

Yours, &c.,

A. WALTER SOCOLOW,
Attorney for Defendant,
Henry M. Propper, as Receiver, &c.,
Office & P. O. Address:
580 Fifth Avenue,
Borough of Manhattan,
City of New York.

To:

HON. JOHN F. X. MCGOHEY,
83 *United States Attorney,*
Attorney for Plaintiff,
U. S. Courthouse,
Foley Square, New York, N. Y.

SCHWARTZ & FROHLICH, Esqs.,
Attorneys for Defendant,
Deems Taylor, as Pres., etc.,
1450 Broadway,
New York, N. Y.

84

Statement of Points

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

TOM C. CLARK, Attorney-General, as successor to the Alien Property Custodian,

Plaintiff-Appellee,

—against—

DEEMS TAYLOR, as President of the American Society of Composers, Authors and Publishers, an unincorporated association of more than seven members,

Defendant-Appellant.

—and—

HENRY M. PROPPER, as Receiver of the property and assets within the State of New York of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, commonly known as A.K.M.,

Defendant-Appelant.

The appellant states that the points upon which he intends to rely on the appeal in this action are as follows (in addition to the points set forth at page 162-164 of the transcript of Record on the previous appeal, which is to form part of the record on the appeal herein):

1. That under the mandate of the Circuit Court of Appeals and the pleadings herein there are serious questions of both fact and law which require a regular legal trial

of the action, and the District Court was without jurisdiction, power or authority to enter a final decree pursuant to the stipulation presented at the pretrial conference.

2. That the District Court was without jurisdiction, power or authority to proceed in this action until a final determination had been made by the courts of the State of New York of the actions now pending therein between the defendant, Henry M. Propper as Receiver as aforesaid, as plaintiff, and the defendant, Deems Taylor as President as aforesaid, construing the New York State statute (Section 977-B of the New York Civil Practice Act) in relation to the rights and title of the defendant Propper as receiver under said statute.

3. That the District Court was without jurisdiction, power and authority to enter the final decree pursuant to the stipulation presented at the pretrial conference, which necessarily involved a review of the order of the New York Supreme Court appointing Henry M. Propper receiver, under which he was expressly vested with all right, title and interest in and to the subject of Count 2 of the complaint in this action and the said cause of action herein. Such review is limited to and should be made by the Appellate courts of the State of New York.

4. That the final decree entered pursuant to the stipulation presented at the pretrial conference is in violation of the rights of creditors who filed claims against the defendant Propper as receiver and of the liens of the attorneys in the State receivership action, none of whom is a party to this action.

5. That the stipulation which is the basis of the final decree herein was entered into between the defendant, Deems Taylor as president, as aforesaid, as the debtor, and the plaintiff as successor of the Alien Property Custodian. The plaintiff's rights, if any, are possessory only, and he had no power to settle or compromise Count 2 of the action on the terms proposed in the stipulation which affects the rights of the defendant Propper as receiver and the rights of creditors who filed claims in the State court action and the liens of said receiver's attorneys. 91

6. That the stipulation which is the basis of the final decree entered herein provides for the payment of an unreasonable and inadequate sum and, in effect, operates as a gratuity to the defendant Taylor as president of American Society of Composers, Authors and Publishers, since it purports to be a settlement of an admittedly large claim for a substantially smaller and inadequate sum, without any justification or basis for such reduction. 92

Dated, New York, N. Y., February 26, 1948.

Yours, etc.,

93

A. Walter Socolow
Attorney for Defendant-Appellant
Henry M. Propper, as Receiver, etc.
Office and Post Office Address:
580 Fifth Avenue
Borough of Manhattan
New York 19, N. Y.

94 To:

Hon. John F. X. McGohey
United States Attorney
Attorney for Plaintiff-Appellee
United States Court House
Foley Square
New York, N. Y.

Schwartz & Frohlich, Esqs.
Attorney for Defendant-Appellee
Deems Taylor, as President, etc.
1450 Broadway
New York, N. Y.

96

Stipulation as to Transcript of Record

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

97

[SAME TITLE]

IT IS HEREBY STIPULATED and AGREED that the Transcript of Record on the previous appeal herein from the judgment dated and entered the 10th day of February, 1947, be and the same hereby is made a part of the record upon the appeal herein from the final decree made and entered the 21st day of November, 1947, and that the re-printing of said Transcript of Record on said previous appeal be and the same hereby is dispensed with and that printed copies of said Transcript of Record now on file in the Office of the Clerk of the Circuit Court of Appeals may be submitted upon the argument and submission of the appeal herein and may be referred to by any of the parties in their respective arguments or briefs with the same force and effect as if said Transcript of Record were printed in this record on appeal herein.

98

IT IS FURTHER STIPULATED and AGREED that this stipulation shall be printed as part of the record on appeal herein.

99

Stipulation as to Transcript of Record

Dated: New York, New York,
March 3rd, 1948.

A. WALTER SOCOLOW,
Attorney for Defendant-Appellant Henry M. Propper, as Receiver of the Property and Assets within the State of New York of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, commonly known as A.K.M.

JOHN F. X. MCGOHEY,
Attorney for Plaintiff-Appellee Tom C. Clark, Attorney General, as successor to the Alien Property Custodian.

SCHWARTZ & FROHLICH,
Attorney for Defendant-Appellee Deems Taylor, as President of the American Society of Composers, Authors and Publishers, an unincorporated association of more than seven members.

Stipulation as to Record

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

The defendant-appellant, Henry M. Propper, as Receiver, as aforesaid, designates the following portions of the Record to be contained in the Record on Appeal in the above-entitled action, which, together with the Transcript of Record on the previous appeal, and the opinion of the Circuit Court on said appeal, are to form the entire record on this appeal:

1. Statement under Rule 15, Subdivision (b).

2. Stipulation dated November 13, 1947.

3. Objections of defendant, Henry M. Propper, as Receiver aforesaid, dated November 13, 1947, and the Exhibits thereto annexed, filed November 21, 1947.

4. Final decree appealed from, dated and entered November 21, 1947.

5. Notice of appeal dated December 5, 1947, and filed December 8, 1947.

6. This designation.

7. Designation by appellees of additional papers, if any, to be included in the record.

106 8. Statement of points upon which defendant-appellant intends to rely upon the appeal herein.

9. Stipulation as to the Transcript of Record on the previous appeal being part of this record.

10. Stipulation as to the record on this appeal.

11. Clerk's certificate.

Dated, New York, N. Y., February 26, 1948.

107 Yours, etc.,

A. WALTER SOCOLOW
Attorney for Defendant-Appellant
Henry M. Propper, as Receiver, &c.
Office & Post Office Address
580 Fifth Avenue
Borough of Manhattan
City of New York

To:

HON. JOHN F. X. McGOHEY
108 *United States Attorney*
Attorney for Plaintiff-Appellee
United States Courthouse
Foley Square
New York, N. Y.

SCHWARTZ & FROHLICH, Esqs.
Attorneys for Defendant-Appellee
Decas Taylor, as President, &c.
1450 Broadway
New York, N. Y.

Stipulation

UNITED STATES CIRCUIT COURT OF APPEALS 109
SECOND CIRCUIT

TOM C. CLARK, Attorney General, as successor to the Alien Property Custodian,

Plaintiff-Appellee,

—against—

DEEMS TAYLOR, as President of the American Society of Composers, Authors and Publishers, an unincorporated association of more than seven members, 110

Defendant-Appellee,

—and—

HENRY M. PROPPER, as Receiver of the property and assets within the State of New York of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, commonly known as A.K.M.,

Defendant-Appellant.

111

IT IS HEREBY STIPULATED AND AGREED that the foregoing is a true transcript of the Record of the said District Court in the above-entitled matter, as agreed upon by the parties.

Stipulation

Dated, New York, N. Y., March , 1948.

112

A. Walter Socolow,
Attorney for Defendant-Appellant Henry M. Propper, as Receiver of the Property and Assets within the State of New York of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, commonly known as A.K.M.

113

John F. X. McGohey,
Attorney for Plaintiff-Appellee Tom C. Clark, Attorney General, as successor to the Alien Property Custodian.

Schwartz & Frohlich,
Attorneys for Defendant-Appellee Deems Taylor, as President of the American Society of Composers, Authors and Publishers, an unincorporated association of more than seven members.

114

Clerk's Certificate

UNITED STATES DISTRICT COURT 115

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, ss.:

I, WILLIAM V. CONNELL, Clerk of the District Court of the United States of America for the Southern District of 116
New York, do hereby certify that the foregoing is the transcript of the printed record of the said District Court in the above-entitled matter as agreed on by the parties.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York this 8 day of March, in the year of our Lord one thousand nine hundred and forty-eight and of the Independence of the said United States, the one hundred and seventy-second.

WILLIAM V. CONNELL,
Clerk. 117

(Seal)

[fol. 40] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1947

No. 294

(Argued June 2, 1948. Decided August 3, 1948).

Docket No. 21018.

TOM C. CLARK, Attorney General, as successor to the Alien Property Custodian, Plaintiff-Appellee,

v.

HENRY M. PROPPER, as Receiver of the property and assets within the State of New York of AKM, Defendant-Appellant

Before: Augustus N. Hand, Clark and Frank, Circuit Judges.

Appeal from the District Court of the United States for the Southern District of New York

Action by James E. Markham, Alien Property Custodian, for whom Tom C. Clark, Attorney General of the United States, has been substituted as successor, against Henry M. Propper, as receiver of the assets within the State of New York of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, commonly [fol. 41] known as AKM, and Deems Taylor, as president of the American Society of Composers, Authors and Publishers, called ASCAP, for amounts owed to AKM by ASCAP and for a declaration that defendant Propper had no rights thereto. From an order holding defendant Propper without rights to the property in question, 70 F. Supp. 202, and a final judgment for plaintiff, defendant Propper appeals. Affirmed.

A. Walter Socolow, of New York City, for Henry M. Propper, defendant-appellant.

Herbert P. Jacoby, of New York City (Schwartz & Frohlich and Louis D. Frohlich, all of New York City, on the brief), for Deems Taylor, defendant-appellee.

David Schwartz, Atty., Office of Alien Property, Dept. of Justice, of Washington, D. C. (David L. Bazelon, Asst. Atty. Gen., Dir., Office of Alien Property, Max Isenbergh, Sp.

Asst. to the Atty. Gen., and James L. Morrisson and David E. Feller, Attys., Office of Alien Property, Dept. of Justice, all of Washington, D. C., and John F. X. McGohey, U. S. Atty., of New York City, on the brief), for Tom C. Clark, Atty. Gen., plaintiff-appellee.

CLARK, *Circuit Judge*:

This appeal raises the questions whether a temporary receiver appointed by a New York state court over assets of German nationals has such title as to defeat a later freezing order of the Executive prohibiting the transfer of enemy [fol. 42] funds and a still later seizure by the Alien Property Custodian or, if not, whether the appointment of a permanent receiver after the effective date of the order is a bar to the Custodian's claim. The district court decided against the claims of the receiver, defendant Propper, and dismissed him from the case. *Markham* v. *Taylor*, D. C. S. D. N. Y., 70 F. Supp. 202. He appealed, but since no final judgment had been entered against the other defendant for the amount due, we dismissed the appeal. *Clark* v. *Taylor*, 2 Cir., 163 F. 2d 940. Final judgment now having been entered, this appeal by Propper tests its validity as well as that of the earlier judgment against him alone.

Since the two previously published opinions just cited contain a review of the facts, we shall limit ourselves to such further statement as is here immediately necessary. The subject matter of the controversy is a sum of money owed as royalties by the American Society of Composers, Authors and Publishers, an unincorporated association, to a similar Austrian organization, AKM, under a contract between the two. Deems Taylor, as president of ASCAP, and Tom C. Clark, Attorney General, as successor to the Alien Property Custodian, have stipulated the amount due to be $46,839.54; and the final judgment ordered the payment of that sum to the Attorney General. On June 12, 1941, defendant Propper was appointed temporary receiver of the assets of AKM located in the State of New York; and this appointment was made permanent by the state court on September 29 of the same year. Meanwhile, on June 14, 1941, the President of the United States by Exec. Order 8389, 5 F. R. 1400, as amended by Exec. Order 8785, 12 U. S. C. A. §95a note, 3 C. F. R., 1941 Supp., p. 225, 6 F. R. 2897, prohibited the transfer of Austrian property unless authorized by the Secretary of the Treasury. The Sec-

retary has not authorized any transfer of AKM assets. On July 29, 1941, Propper sued Taylor, representing ASCAP, in [fol. 43] the New York state courts to recover the sum allegedly due. This suit has not yet been finally adjudicated. On September 4, 1943, the Alien Property Custodian, plaintiff's predecessor, vested in himself all assets held by ASCAP for the Austrian organization. ASCAP, however, refused the Custodian's demand for a turnover of the sums allegedly due; and the Custodian then brought suit in the District Court, against both Taylor, as president of ASCAP, and Propper, to secure the turnover and a declaration that Propper had no right to the fund. The court there held that Propper, as a temporary receiver appointed under §977-b of the N. Y. Civil Practice Act, had no title or interest in the funds held by ASCAP, that the Executive Order prohibiting the unlicensed transfer of property owned by Austrian nationals was effective prior to the appointment of Propper as permanent receiver, and that he could receive no title to these assets by virtue of such appointment, the prohibition being applicable alike to transfers of a judicial character and those of a voluntary nature. *Markham* v. *Taylor, supra.* Hence the court entered the summary judgment against Propper from which the earlier appeal was taken.

After the dismissal of this appeal and the filing of the stipulation between plaintiff and ASCAP settling the amount due as between them, the district judge at a hearing on pre-trial determined that there was no further obstacle to final judgment, and therefore entered summary judgment for plaintiff. On this appeal Propper is of course confined to his claims of law, but he asserts that the stipulated amount represents a sum much less than that actually owed by ASCAP to AKM.

The first question is therefore whether Propper's appointment as temporary receiver before the Executive freezing order gave him such title to the chose in action in question as to prevent its seizure by the Custodian. The [fol. 44] authority for the appointment, N. Y. Civil Practice Act, §977-b, is a statute passed in 1936 for the appointment of "Receivers to liquidate local assets of foreign corporations." It authorizes the appointment of a temporary receiver "pending the determination of the action"; it specifies the mode of service of process on the defendant; and it provides for the entry of judgment and the appointment

of a permanent receiver upon default of the defendant, or after trial. Judge Coxe held that this section did not depart from the general New York rule, applicable to chancery as well as statutory receiverships, namely, that a temporary receiver does not obtain title by virtue of his appointment. We agree.

The New York courts have consistently ruled that a temporary receiver *pendente lite* does not obtain title to the property, but has only a right of possession. *Keeney* v. *Home Ins. Co.*, 71 N. Y. 396, 27 Am. Rep. 60; *Herring* v. *New York, L. E. & W. R. Co.*, 105 N. Y. 340, 12 N. E. 763; *Decker* v. *Gardner*, 124 N. Y. 334, 26 N. E. 814, 11 L. R. A. 480; *Stokes* v. *Hoffman House*, 167 N. Y. 554, 60 N. E. 667, 53 L. R. A. 870; *Sigua Iron Co.* v. *Brown*, 171 N. Y. 488, 64 N. E. 194; *Mutual Brewing Co.* v. *New York & College Point Ferry Co.*, 16 App. Div. 149, 45 N. Y. S. 101; *In re French*, 181 App. Div. 719, 168 N. Y. S. 988, affirmed 224 N. Y. 555, 120 N. E. 863. See N. Y. General Corporation Law, §§162, 163, 168. Since these precedents show such general understanding in New York of the restricted rights of a temporary receiver, we should look for clear statutory language to disclose a different intent for this one situation here. None is to be found in §977-b of the N. Y. Civil Practice Act. Nowhere in that statute is the temporary receiver in terms given the title, as appellant contends. Indeed, the only provision spelling out what the temporary receiver takes is subd. 4 of the section, which states that he "shall take, receive and reduce to his possession any and all assets, [fol. 45] credits, choses in action and property" in the state of New York. This, as we have seen, is no more than what the chancery receiver took in accordance with the well-settled principles of New York law.

Appellant, however, relying largely on subd. 12, tries to establish that the temporary receiver has the powers of a permanent receiver and hence takes title to the property. In its entirety that subdivision reads: "Any receiver appointed pursuant to this section shall have all the powers and duties, in addition to those herein provided for, as are possessed by and conferred upon receivers and trustees by the laws of the state of New York." Appellant reasons that "any receiver" includes a temporary one and accordingly that he has the powers of a permanent receiver. We think his argument proves too much. Subd. 4 defines the temporary receiver's powers and states that he can reduce the

property to possession. It does not even suggest that he takes title. Clearly there would be little purpose in spelling out restricted powers there if the later subdivision was intended to make them unlimited. To do so would set at naught the distinction between a temporary and permanent receiver so obviously intended by the language of the statute. More readily the quoted language should be read to mean that a temporary receiver under this provision takes the usual powers of other temporary receivers in New York.

Appellant offers a further variant of this argument based upon his contention that the final judgment whereby he was made permanent receiver established that AKM had ceased to exist at the time of his initial appointment as temporary receiver. From that he concludes that the property vested by the order appointing him temporary receiver and not by the final judgment entered in that action. He offers no compelling argument as to why his appointment as permanent receiver should be given such retroactive effect. Nor does he cite any case that supports his view. [fol. 46] We have found none; nor do we think the result desirable. The decisive point of time to consider in determining whether Propper had title to AKM's assets in the state of New York was June 14, 1941, when the Executive Order forbade any unlicensed transfer of its property. At such time, and under the appointment he then had, Propper's only power was to reduce the assets to possession. In a different context we have recently declared our unwillingness to give retroactive effect to state law so as materially to alter rights accruing to the federal government under a federal statute. *Daine* v. *C.I.R.*, 2 Cir., June 2, 1948. We think the reasons for refusing retroactivity are the more compelling here. For if appellant's position is sound, then the right of the Custodian to an enemy alien's property must wait upon the litigation by private persons in state courts—litigation that might well be collusive and certainly would be protracted.

Appellant's other main argument is that the regulation of the Treasury Department, General Ruling No. 12, parag. (4), April 21, 1942, 7 F. R. 2991, allows a transfer of property by the courts. Thus his appointment as permanent receiver on September 29, 1941, would accomplish the transfer of AKM's assets to him. The Treasury Department, in Public Circular No. 31, issued August 2, 1946, 11 F. R. 8351, in interpreting that regulation bluntly states that "the judi-

cial process cannot, without a license or other authorization from the Secretary of the Treasury, operate to transfer or create any interest in blocked property." We agree with this interpretation. The language of Exec. Order 8389 prohibits the unlicensed transfer of an enemy alien's property. There is no cogent reason for excepting transfers by judicial process. To allow the exception would be to furnish a means of evasion by which the impact of freezing controls could be avoided by recourse to judicial proceedings. Such would negate the executive and legislative inten-
[fol. 47] tion. Appellant has cited *Singer* v. *Yokohama Specie Bank*, 293 N. Y. 542, 58 N. E. 2d 726, in support of his position. But the problem is not the construction of a state statute in this aspect of the case, and accordingly interpretation of the ruling by the state court is not decisive. For the reasons stated we are of the opinion that the prohibition of unlicensed transfers as contained in Exec. Order 8389 is universal. The critique of this New York case in Berger and Bittker, *Freezing Controls: The Effects of an Unlicensed Transaction*, 47 Col. L. Rev. 398, is persuasive.

On this appeal Propper makes an additional contention, not made in his earlier appeal, but undoubtedly stimulated by certain expressions found in our opinions as originally filed, though omitted from the final opinions refiled upon denial of rehearing. This is that the interpretation of N. Y. Civil Practice Act, §977-b, is for the New York courts, and that this action should be dismissed or stayed pending the obtaining of a state ruling, in reliance upon cases such as *Musser* v. *State of Utah*, 333 U. S. 95; *City of Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168; *Railroad Commission of Texas* v. *Pullman Co.*, 312 U. S. 496. We do not think, however, that this is the occasion for that somewhat drastic course. It seems designed for and limited to cases involving serious and doubtful questions, often of a constitutional nature, involving the inner economy or the sovereign rights of a state where federal action, if not circumspect, may upset the delicate balances necessarily inherent in a federal system of government. We should doubt if a mere interpretation of a procedural statute, easily corrected if erroneous without noticeable impact upon the public activities of the state, would show such a case at best. Certainly it would seem not to do so when our interpretation simply follows the usual state construction in a more or less routine manner where the issue is not doubtful. Moreover, this case

involves also unusually important federal rights, whose con- [fol. 48] struction is at once more difficult and more far-reaching than any question of state's rights here involved. Such federal ruling as to wartime powers of the national government is not of the sort which can properly await the long delays found a necessary concomitant to the seeking of state guidance in special cases. We therefore deny appellant's request. See *Meredith* v. *City of Winter Haven*, 320 U. S. 228, *Markham* v. *Allen*, 326 U. S. 490.

Appellant's further jurisdictional objection (and this he has stressed from the beginning) is that the subject matter of the controversy is in the custody of the state court, thus excluding federal power. This is answered by pointing to the fallacy of the assumption that, even if such custody be considered to exist, it is decisive. The federal court can resolve the claim of the Custodian and those of other claimants to property in the custody of a state court; and often, if not generally, it is important and necessary that the issue be settled promptly and decisively. *Markham* v. *Allen*, *supra*; *Clark* v. *Tibbetts*, 2 Cir., 167 F. 2d 397. Indeed, the New York courts have expressly so held. *Application of Alien Property Custodian of U. S.*, 270 App. Div. 732, 60 N. Y. S. 2d 897. See *In re Sielcken's Estate*, 167 Misc. 327, 3 N. Y. S. 2d 793; *Stern* v. *Newton*, 180 Misc. 241, 39 N. Y. S. 2d 593. And where, as here, it appears that there is left no adverse claim before the court, judgment for the plaintiff necessarily results.

Affirmed.

[fol. 49] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 3rd day of August, one thousand nine hundred and forty-eight.

Present: Hon. Augustus N. Hand, Hon. Charles E. Clark, Hon. Jerome N. Frank, Circuit Judges.

TOM C. CLARK, Attorney General, etc., Plaintiff-Appellee,

v.

DEEMS TAYLOR, as President of ASCAP, etc., Defendant-Appellee,

HENRY M. PROPPER, Receiver, etc., Defendant-Appellant

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk, by A. Daniel Fusaro, Deputy Clerk.

[fol. 50] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Tom C. Clark, Attorney General, etc., v. Deems Taylor, etc., & Henry M. Propper, etc. (294.) Judgment. United States Circuit Court of Appeals: Second Circuit. Filed August 3rd, 1948. Alexander M. Bell, Clerk.

[fol. 51] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 52] SUPREME COURT O

ORDER ALLOWING CERTIOR

The petition herein for a
States Court of Appeals for
limited to questions 1 and
the writ.

And it is further ordered
the transcript of the proceed
the petition shall be treated
such writ.

The Chief Justice took n
decision of this application.

(1

ORARI—Filed January 3, 1949

a writ of certiorari to the United
or the Second Circuit is granted.
d 2 presented by the petition for

ed that the duly certified copy of
edings below which accompanied
ed as though filed in response to

no part in the consideration or
n.